

Testimony of Daniel P. Tokaji

Committee on House Administration, Subcommittee on Elections

“Election Day Registration and Provisional Voting”

November 7, 2007

My name is Daniel P. Tokaji. I am an Associate Professor of Law at the Ohio State University’s Moritz College of Law, and the Associate Director of *Election Law @ Moritz*, a group of scholars whose mission is to provide nonpartisan and reliable analysis on election law matters.¹ My research and scholarship focuses primarily on election administration and voting rights. Thank you for inviting me to testify before you today.

I start with some background on election reform, including the central democratic values that are at stake with respect to voter registration. I then turn to a more detailed discussion of provisional voting and election day registration (“EDR”), focusing on the relationship between these two topics.

As explained below, provisional voting has its benefits, but carries with it some significant concerns as well. Foremost among them are the potential for the rejection of eligible voters’ ballots, unequal treatment of voters due to inconsistent practices, and post-election litigation over whether to count provisional ballots. In addition to increasing voter participation, EDR has the advantage of reducing reliance on provisional ballots and thus

preventing these problems. EDR thus provides a promising avenue – at this point probably *the* most promising avenue – for making our democracy more accessible to all citizens, while at the same time reducing the likelihood of protracted post-election litigation.

Background

Over the past seven years, issues of election administration have received an unprecedented level of attention. That attention has come not only from legislators, administrators, judges, and scholars, but also from concerned members of the general public.

The Help America Vote Act of 2002 (“HAVA”) was truly a landmark piece of legislation, in that it represented an acknowledgment that the federal government should take responsibility for the manner in which federal elections are conducted. Of course, the day-to-day administration of elections remains primarily in the hands of thousands of state and local officials across the country. But HAVA provided much-needed funds to improve the deteriorating infrastructure of American democracy, as well as some minimal standards aimed at promoting the ideal that every eligible citizen should be able to vote and have his or her vote counted accurately.

While there are particular provisions of HAVA over which there is legitimate disagreement, Congress’ acceptance of responsibility for how federal elections are conducted

¹My affiliations with the University, the College of Law, and Election Law @ Moritz are provided solely for purposes of self-identification. This testimony is offered solely on my own behalf.

was clearly a step in the right direction. It is equally clear, however, that the work of election administration is far from complete. It is therefore encouraging that this Committee is holding hearings on the question of what further upgrades can be made to the infrastructure of our democracy.

Voter registration and provisional voting are at the top of the list, in terms of election administration topics most in need of further examination. Although voting machines got most of the attention shortly after the 2000 election, it quickly became apparent that voter registration was at least as significant a cause of lost votes. The Caltech/MIT Voting Technology Project estimated that between 1.5 and 3 million votes were lost in 2000 due to voter registration foul-ups, compared to 1.5 to 2 million lost due to faulty equipment and ballot design.²

HAVA's provisional voting requirement³ was intended to protect people from having their votes rejected due to registration errors. The idea was the people whose names did not appear on the registration list, but claimed to be eligible and registered, would be permitted to cast a provisional ballot, which would be counted if their information could later be confirmed. Voters who do not provide required identifying information are also entitled to cast a provisional ballot, as a sort of "fail-safe voting" method of voting.⁴

²Caltech/MIT Voting Technology Project, *Voting – What Is, What Could Be* 9 (2001).

³42 U.S.C. § 15482.

⁴42 U.S.C. § 15483(b)(2)(B).

In a similar vein, HAVA's requirement that every state implement a statewide voter registration list⁵ was intended to help make registration systems more accurate. This would at once help ensure that the votes of eligible citizens would be counted and making it more difficult for ineligible people to vote. As Representative Steny Hoyer so memorably put it, the idea was to make it "easier to vote" but "harder to cheat."⁶

This comment highlights the two central democratic values that election reform efforts generally have sought to promote: *access* and *integrity*. The value of access refers to the idea that our democracy should do its best to facilitate participation by all eligible citizens. The value of integrity entails the notion that our elections ought to be conducted in a fair and transparent manner so as to minimize the potential for fraud and other improprieties. While there may sometimes be some tension between these oft-cited values, they are both essential to a well-functioning election system.

While access and integrity are the democratic values that have received the greatest attention in recent years, there is a third value that also warrants mention. That is the value of *finality* when it comes to the resolution of elections. Finality refers to the idea that any disputes regarding the outcome of elections, should be fairly resolved within a reasonable period of time after Election Day. For disputes over the outcome of an election to stretch on for weeks or months afterwards risks damaging public confidence, as well as election officials' practical

⁵42 U.S.C. § 15483.

⁶Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1213 (2005). This article discusses the history, goals, and requirements of HAVA more extensively than is possible here. *Id.* at 1209-20.

ability to do their jobs. While post-election litigation may sometimes be inevitable, it is certainly not desirable. To the extent possible, steps should be taken to avoid the need for post-election disputes of the type seen after Florida's 2000 general election. In other words, our elections system ought to serve the value of finality, as well as the values of access and integrity.

Provisional Voting

This brings me to the topic of provisional voting which, as mentioned a few moments ago, is one of HAVA's cornerstone requirements. This requirement had its genesis in the recommendations of the bipartisan National Commission on Federal Election Reform, jointly chaired by former Presidents Jimmy Carter and the late Gerald Ford.⁷ This Commission, commonly known as the "Carter-Ford Commission," articulated a vision of provisional voting in which: "No American qualified to vote anywhere in her or his state should be turned away from a polling place in that state."⁸ The Carter-Ford Commission cited as a model the system in the State of Washington, in which provisional ballots were provided in cases where there was a question about a voter's eligibility. Election officials researched the voter's eligibility after the election and, if it turned out that the voter was eligible to vote somewhere else in the state, the provisional ballot would be sent there to be tallied for those races in which the person was entitled to vote.⁹ Provisional ballots would also have the side-benefit of improving the accuracy of registration lists, by allowing officials to catch and correct mistakes.

⁷National Commission on Federal Election Reform, *To Assure Pride and Confidence in the Electoral Process* (2001).

⁸*Id.* at 35.

Consistent with the Carter-Ford Commission’s recommendation, HAVA required that provisional ballots be required in certain circumstances. Under HAVA, two groups of voters must be issued provisional ballots: 1) those who claim to be eligible and registered, but whose names do not appear on the official registration list,¹⁰ and 2) those who did not, at the time of voting, present the identifying information required for first-time voters who registered by mail.¹¹ A voter’s provisional ballot should then be counted, if he or she is determined eligible to vote after the election.¹² Provisional voting, if administered properly, can advance the values of both access and integrity. It can advance the value of access by making sure that eligible voters aren’t turned away from the polls. At the same time, they can advance the value of integrity by making sure that only eligible voters have their votes counted.

On the other hand, if not administered properly, provisional ballots can cause some serious problems. Perhaps the most significant is eligible voters’ provisional ballots *not being counted*, due to inadequate verification procedures or overly stringent standards. If that happens, provisional ballots can wind up functioning as nothing more than a placebo for voters¹³ – it may make them feel better by allowing them to cast a ballot on Election Day, but will not really promote access if many ballots are rejected.

There is some evidence that this has in fact happened, particularly in states that implemented provisional ballots for the first time in the 2004 election. Those states counted only

⁹*Id.*

¹⁰42 U.S.C. § 15482(a).

¹¹42 U.S.C. § 15483(b)(2)(B).

¹²42 U.S.C. § 15482(a)(4).

¹³See Demos, *Placebo Ballots: Will “Fail-Safe” Voting Fail?* (2004).

33% of provisional ballots, compared to 58% in states that had experience with provisional ballots.¹⁴ The time that states allotted to verify the eligibility of provisional voters also made a significant difference, with those states allowing more time counting more ballots.¹⁵ Another factor is whether states counted provisional ballots cast in the wrong precinct, for those races in which the voter was entitled to vote, as originally envisioned by the Carter-Ford Commission. States that did not count out-of-precinct provisional ballots counted only 42% of all their provisional ballots, compared to 56% in states that did count out-of-precinct provisional ballots.¹⁶

A second problem with provisional ballots is that *inconsistent standards and procedures* may be applied within a state. One of the peculiar features of American election administration is its highly localized nature, in which county or municipal officials have primary responsibility for conducting elections – including the counting of votes. If different jurisdictions within a state have different practices, for determining who should receive a provisional ballot or which provisional ballots will be counted, then it is very likely that voters will be treated unequally in different parts of the state. There is some evidence of inconsistencies in how provisional voting is handled from county to county (or from municipality to municipality) within states. There are substantial differences not only in the number of provisional ballots issued, but also in the

¹⁴Eagleton Institute of Politics & Moritz College of Law, *Report to the U.S. Election Assistance Commission on Best Practices to Improve Provisional Voting Pursuant to the Help America Vote Act of 2002*, at 12 (June 28, 2006). I was part of the research team for this report, which was funded by the U.S. Election Assistance Commission (“EAC”).

¹⁵*Id.*, App. B, Tab. 1 (finding that, in states with a high level of provisional voting, those allowing more than two weeks counted 73.8% while those allowing less than one week counted 58.6%).

¹⁶*Id.* at 14.

percentage counted among jurisdictions within states.¹⁷ This could very well give rise to a claim that voters' rights under the Equal Protection Clause of the U.S. Constitution have been violated, on a theory similar to that accepted by the Supreme Court in *Bush v. Gore*.¹⁸ In fact, such a lawsuit was brought in Ohio during the 2004 election, alleging that different counties were applying different standards for determining which provisional ballots to count, though it was not litigated to judgment.¹⁹ It is distinctly possible that we will see such litigation in future elections, however, particularly in cases involving close statewide races.

This raises a third problem with provisional voting: a large number of provisional ballots creates and *increased risk of post-election disputes* over the outcome. In fact, whether to count provisional ballots is probably one of the two most important things that candidates can fight over in the wake of a close election (the other being ambiguously marked ballots, such as those which gave rise to the Florida 2000 litigation, or other equipment-related problems). It follows that a large number of provisional ballots can negatively affect the value of finality. The more provisional ballots that remain to be counted after Election Day, the more there is for the parties and their candidates to fight over. All other things being equal, a congressional election decided by 250 votes is much more apt to lead to post-election litigation if there are 5000 provisional ballots than if there are 50 such ballots.

My description of these problems should not be interpreted as an argument that it was a mistake to require provisional ballots as part of HAVA. In fact, I believe that this was a worthy

¹⁷*Id.* at 15.

¹⁸531 U.S. 98 (2000).

¹⁹See Tokaji, *Early Returns on Election Reform*, at 1232-33.

reform that has had beneficial effects. At the same time, the problems identified above – eligible voters ballots being rejected, inequalities in administering provisional ballots, and post-election litigation – all command serious attention. I would call special attention to the risk of disputed elections, in states where a large number of provisional ballots are cast. This risk points to the desirability of reducing reliance on provisional ballots, by implementing alternative procedures that will allow eligible voters to cast a regular ballot.

Election Day Registration

One of the practices that can most successfully reduce the need for provisional ballots is election day registration or “EDR.” Nine states currently have laws in place that allow for some form of EDR.²⁰ While the details of these laws vary somewhat from state to state, the basic idea is that a voter can appear at his or her polling place on Election Day and cast a vote. This has the advantage of mobilizing voters who become engaged relatively late in the election system. In states with an earlier deadline for voting – say 30 or even 14 days before Election Day – those people would not be able to participate in the election. In EDR states, by contrast, those citizens may exercise their right to vote, provided that they comply with the state’s verification requirements. In Wisconsin and Minnesota, both which have had EDR systems in place for many years, voters may confirm their eligibility either by presenting proof of residence (such as a driver’s license, utility bill, or paycheck) or by having another eligible voter corroborate their eligibility.

Empirical research confirms that EDR substantially increases participation. One study found that Maine, Minnesota, and Wisconsin (all of which adopted EDR in the mid-1970s) saw increases in their turnout after adopting EDR and sustained their high turnout rates in the years that followed, even as turnout in other states declined.²¹ This accords with research in other states, which finds a consistently positive increase in turnout associated with EDR. One study found that average turnout with EDR is 59%, compared to 53% with a 30-day closing date for registration.²² Overall, EDR is estimated to increase turnout somewhere by 5 - 10%.²³ The increase does not appear to yield a partisan advantage for either Democrats or Republicans.²⁴ EDR can, however, help bring in younger voters as well as new state residents.²⁵

Despite the increase in voter participation, EDR has its detractors. The most commonly made argument against EDR is that it will increase the likelihood of voter fraud, to the extent that ineligible people try to vote on Election Day. The available evidence does not support the conclusion that EDR results in an increase in voter fraud. A recent study found only ten cases of

²⁰Those states are Idaho, Maine, Minnesota, New Hampshire, Wisconsin, Wyoming, Iowa, Montana, and North Carolina.

²¹See Mark J. Fenster, *The Impact of Allowing Day of Registration Voting on Turnout in U.S. Elections from 1960 to 1992*, 22 AM. POLITICS RESEARCH 74, 80, 84 (1994).

²²See Craig L. Brians & Bernard Grofman, *Election Day Registration's Effect on U.S. Voter Turnout*, 82 SOC. SCI. QUARTERLY 170, 176-77 (2001) (finding a 7% increase with EDR in the average state).

²³Fenster, *The Impact of Allowing Election Day Registration*, at 74, 84 (national EDR would increase turnout 5%); Benjamin Highton, *Easy Registration and Voter Turnout*, 59 JOURNAL OF POLITICS 565, 568 (1997) (finding turnout approximately 10% higher in states with EDR or no registration).

²⁴Brians & Grofman, *Election Day Registration's Effect on U.S. Turnout*, at 177, 178.

²⁵See R. Michael Alvarez & Jonathan Nagler, *Election Day Voter Registration in Iowa* (estimating that turnout of those 18-25 would increase by 10.7% with EDR); Stephen Knack & James White, *Election-Day Registration and Turnout Inequality*, 22 POLITICAL BEHAVIOR 29 (2000)(noting increase among younger voters with EDR).

documented voter fraud in EDR states between 1999 and 2005.²⁶ Of these, only one was a case of voter impersonation at the polls, and that case was unrelated to that state's EDR law. The study included a survey of county prosecutors, who reported only a handful of documented cases of voter fraud. In sum, "the collective evidence suggests that there has been very little vote fraud in EDR states over the past several election cycles."²⁷ The implementation of statewide voter registration databases, which under HAVA must now be coordinated with state motor vehicle, criminal, and death records,²⁸ makes it even more difficult for an ineligible person to vote without detection.

While the turnout benefits of EDR are widely recognized, another advantage has received virtually no attention: allowing EDR can almost entirely eliminate the need for provisional ballots. That is primarily due to the fact that voters whose registration forms are mishandled need not cast a provisional ballot in EDR states. Instead, they may simply register at the polls. Consider, for example, voters whose names do not appear on registration lists when they appear at the polling place for any of the following reasons:

§ a third-party registration group soliciting voter registration inadvertently failed to return the form,

§ a public agency that took the voter's registration application, such as a state motor vehicle office, failed to transmit that registration to the appropriate county election office, or

²⁶Lorraine Minnite, *Election Day Registration: A Study of Voter Fraud Allegations and Findings on Voter Roll Security* (2007), http://www.demos.org/pubs/edr_fraud_v2.pdf.

²⁷*Id.* at 4.

§ the county election office made a data-entry error, say in the voter's home address, causing the voter's not to appear on the registration list for his or her polling place.

In each of these circumstances, the voter's name would not appear on the registration list for the proper polling place when he or she shows up to vote on Election Day. In a state without EDR, that voter would be relegated to the provisional voting process. In an EDR state, by contrast, the voter would be permitted to register and vote on Election Day, provided that he or she satisfied state requirements for confirming eligibility.

The data on provisional voting confirms that EDR states are much less reliant on provisional ballots than other states. In the 2004 election, for example, the EDR states of Maine, Wisconsin and Wyoming all had 0.05% or less of their registered voters cast provisional ballots.²⁹ Maine had only 483 provisional ballots cast *statewide*, while Wisconsin had only 374, and Wyoming just 95.³⁰ In Minnesota, there were zero provisional ballots cast in the 2004 presidential election.³¹ By contrast, almost 2% of Ohio's registered voters – a total of 157,714 people – cast provisional ballots in 2004.³² Quite clearly, the much larger number of provisional ballots cast increases the likelihood of a close election turning into a disputed election. It is not difficult to imagine the nightmare scenario that would have emerged in Ohio in 2004, had the margin of victory been closer. The two candidates would have wound up arguing over whether

²⁸42 U.S.C. § 15483(a)(2)(A) & (a)(5)(B).

²⁹Kimball W. Brace & Michael P. McDonald, *Final Report of the 2004 Election Day Survey Submitted to the U.S. Election Assistance Commission* 6-9, Tab. 6a (2005).

³⁰*Id.* at 6-14.

³¹*Id.*

³²*Id.* at 6-9, Tab. 6a, and 6-14.

provisional ballots should be counted in counties across the state, just as they argued over whether punch card ballots should be counted after Florida's 2000 election.

Greater participation in our democracy is thus only one of the benefits of EDR. Adopting EDR can virtually eliminate the need for provisional ballots and, with it, a potential source of contestation and litigation over close elections. It can also eliminate the numerous problems associated with provisional ballots that I have already mentioned. Put more simply, EDR promotes the value of *finality* as well as access, and does so without sacrificing electoral integrity.

I thank you for granting me the opportunity to appear before you and look forward to your questions.